No. 13345

UNITED STATES

COURT OF APPEALS

For the Ninth Circuit Court

THE STATE OF OREGON, THE FISH COMMISSION OF OREGON, THE OREGON STATE GAME COMMISSION,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

PORTLAND GENERAL ELECTRIC COMPANY,

Intervenor.

Petition for Review to Set Aside Order of the Federal Power Commission

BRIEF OF INTERVENOR PORTLAND GENERAL ELECTRIC COMPANY IN ANSWER TO BRIEF OF PETITIONERS, THE FISH COMMISSION OF OREGON AND THE OREGON STATE GAME COMMISSION.

CLARENCE D. PHILLIPS
Atttorney for Intervenor

Of Counsel
PHILLIPS, COUGHLIN, BUELL & PHILLIPS
807 Electric Building
Portland, Oregon

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PAUL P. O'BRIEN

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OPENING STATEMENT

In view of the statement of facts set forth in pettitioners' brief, any additions thereto by the intervenor will be very brief.

The intervenor filed its petition with the Federal Power Commission seeking a major license to be issued to Portland General Electric Company to construct and maintain a hydroelectric project on the Deschutes River. The petition was filed pursuant to the Federal Power Act. U. S. C. A. Sec. 791a, et seq.

The Deschutes River is a tributary of the Columbia River. The Deschutes River may not actually be used for navigation at the site of the Pelton dam, but there is no question as to the navigability of the Columbia River, of which the Deschutes is a tributary.

The proposed project on the Deschutes River would occupy lands which are owned by the United States government (R. 158, 331, 433). The lands on the east side of the river are owned by the United States government and reserved for power purposes under references made hereafter in the brief. The land on the west side of the river is owned by the United States government as a reservation for the Warm Springs Indians.

The Confederated Tribe of Warm Springs Indians was a party to the proceeding before the Federal Power Commission and offered no objection to the issuance of a license for the proposed project. (R. 354). The land within the boundaries of the Warm Springs Indian Reservation was defined in a treaty of the United States dated June 25, 1855 (R. 543, 546). A portion of the Deschutes

and Metolius Rivers forms a part of the boundaries of the Indian Reservation. The Deschutes River at the Pelton site where the Portland General Electric Company proposes its project is on a portion of the Deschutes River which forms such boundary. The Indian Treaty of 1855 provided, among other things, "that the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians."

Neither the Fish Commission of Oregon nor the Oregon State Game Commission has made any claim to ownership or proprietorship of either land, water, or use of water at the site of the proposed project.

The findings of the Federal Power Commission to which the petitioners take exception as shown in petitioners' brief, may be subdivided into the following major points:

1. Jurisdiction of the Federal Power Commission, including the effect upon navigation of a tributary stream and the authority of the United States through the Federal Power Commission to exercise control by reason of ownership of lands.

2. The authority of the federal government over water and the use of water in streams flowing through or bordering on lands owned by the United States.

3. Statutes of Oregon with respect to use of water and the public necessity of using the same for power purposes.

4. The absence of any rights resting in the Fish Commission of Oregon or the Oregon State Game Commission by reason of the implied repeal of a 1921 statute, because of the subsequent enactment of the Hydroelectric Act of Oregon in 1931, and by reason of the fact that the petitioners are not aggrieved parties under the Federal Power Act.

5. The proprietary right of the United States to grant a license through the medium of the Federal Power Commission, including the right of use land and the right to use water for such a project.

I.
JURISDICTION OF THE FEDERAL POWER COMMISSION

Points 1 to 4 inclusive, shown on pages 15 and 16 of petitioners' brief, all pertain to the jurisdiction of the Federal Power Commission and for purposes of brevity will be treated together under this heading.

POINTS AND AUTHORITIES

Navigability

1.

Under the Federal Power Act the United States has jurisdiction over power projects in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states or upon any part of the public lands and reservations of the United States.

USCA Title 16, *Section* 797 (*e*).

II.

The navigable waters of the United States as defined in the Federal Power Act are very broad.

USCA Title 16, *Section* 796 (8).

III.

The authority of any state is limited by the paramount authority of the United States as to the tributaries of navigable streams and also streams bordering on lands owned by the United States.

The Daniel Ball v. U. S., 77 *US* 557, 10 *Wall.* 557, 19 *L. Ed.* 999.

U. S. v. Rio Grande Irrigation Co., 174 *US* 690, 703, 708, 19 *S. Ct.* 770, 43 *L. Ed.* 1136.

U. S. v. Appalachian Power Co., 311 *US* 377, 61 *S. Ct.* 291, 85 *L. Ed.* 243. *Rehearing denied* 312 *US* 712, 61 *S. Ct.* 548, 85 *L. Ed.* 1143. *Petition denied* 317 *US* 594, 63 *S. Ct.* 67, 86 *L. Ed.* 487.

U. S. v. Utah, 283 *US* 64, 75 *L. Ed.* 844.

IV.

The jurisdiction of the United States extends to tributaries of navigable streams even though such tributaries may not be navigable.

U. S. v. Appalachian Power Co., 311 *US* 377, 61 *S. Ct.* 291, 85 *L. Ed.* 243.

Oklahoma v. Atkinson, 313 *US* 508, 85 *L. Ed.* 1487.

Georgia Power Company v. Federal Power Commission, 152 *Fed. 2d.* 908, 913.

Grand River Dam Authority v. Going, 29 Fed. Sup. 316, 323.

ARGUMENT

The Federal Power Act was first enacted in 1920. *Title* 16 *USCA, Section* 791*a. et seq.* The general purpose of the act appears to provide a proper co-ordination over the waters of the United States which might in any way affect navigation and has been upheld by the courts under the commerce clause of the United States Constitution.

The court will note under the act, *Title* 16 *USCA, Section* 797 (*e*), that jurisdiction of the Federal Power Commission is founded upon two major premises. The

first covers improvements in streams or other bodies of water under which Congress has jurisdiction, and among the several states. The second is upon ownership of the public lands or reservations by the United States. The matter of property ownership by the United States will be treated hereinafter in this brief.

Under the navigability features of the Federal Power Act it was interpreted in the usual manner for some years depending upon a factual showing of actual navigation within the stream in question. This was a strict interpretation of the general rule of navigability. However, as time progressed, the boundaries of interpretation expanded and the United States Supreme Court in 1940 rendered its decision in the case of *United States v. Appalachian Electric Power Company,* 311 *US* 377, 85 *L. Ed.* 243, 261, 262. This is sometimes known as the "New River Case." The New River rises in northwest North Carolina near the Virginia line and runs for approximately 250 miles through Virginia and West Virginia where it unites with the Gauley River to form the Kanawha River, which in turn flows into the Ohio River. The opinion of the lower court, *United States v. Appalachian Electric Power Company,* 107 *Fed. 2d.* 769, 781, gives an extensive discussion of the characteristics of the river, pointing out that the peculiar geologic formation of the rocky bed due to folds and faults in the

rock strata produced ledges running across the stream in many places. The water in many places falls over the ledges almost vertically. Some of the ledges are upthrust above the surface of the water and some are barely submerged. However, in spite of the factual situation which would ordinarily indicate non-navigability, the United States Supreme Court in its opinion said the following:

> "The respondent is a riparian owner with a valid state license to use the natural resources of the state for its enterprise. Consequently it has as complete a right to the use of the riparian lands, the water, and the river bed as can be obtained under state law. The state and respondent, alike, however, hold the waters and the lands under them subject to the power of Congress to control the waters for the purpose of commerce. The power flows from the grant to regulate, i. e., to 'prescribe the rule by which commerce is to be governed.' This includes the protection of navigable waters in capacity as well as use. This power of Congress to regulate commerce is so unfettered that its judgment as to whether a structure is or is not a hindrance is conclusive. Its determination is legislative in character. The Federal Government has domination over the water power inherit in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property; 'that the running water in a great navigable stream is capable of private ownership is inconceivable.' Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion.
>
> Posssesing this plenary power to exclude structures from navigable waters and dominion over flowage and its product, energy, the United States may

make the erection or maintenance of a structure in a navigable water dependent upon a license. This power is exercised through Sec. 9 of the Rivers and Harbors Act of 1899, 33 USCA Sec. 401, prohibiting construction without congressional consent and through Sec. 4 (e) of the present Power Act, 16 USCA Sec. 797 (e).

* * * * * *

"In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. By navigation respondent means no more than operation of boats and improvement of the waterway itself. In truth the authority of the United States is the regulation of commerce on its waters. Navigability, in the sense just stated, is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control. As respondent soundly argues, the United States cannot by calling a project of its own 'a multiple purpose dam' give to itself additional powers, but equally truly the respondent cannot, by seeking to use a navigable waterway for power generation alone, avoid the authority of the Government over the stream. That authority is as broad as the needs of commerce. Water power development from dams in navigable streams is from the public's standpoint a by-product of the general use of the rivers for commerce. To this general power, the respondent must submit its single purpose of electrical production. The fact that the Commission is willing to give a license for a power dam only is of no significance in appraising the type of conditions allowable. It may well be that this portion of the river is not needed for navigation at this time. Or that the dam proposed may function satisfactorily with others, contemplated or intended It may fit in as a part of the river development. The

> point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government."

This court will observe that this broad interpretation recognizes the fact that any tributary of a navigable stream becomes important in maintaining navigation by reason of its flow into a navigable stream and providing the water for navigation.

This same interpretation of the Federal Power Act is found in *Georgia Power Company v. Federal Power Commission,* 152 *Fed. 2d.* 908, 913 involving a power project on the Oconee River in northeastern Georgia which was a remote tributary of a navigable stream. In its decision the court said:

> "(6) We fully agree with the Fourth Circuit that: 'One of the purposes of the Water Power Act was to authorize the Commission to license dams in navigable waters of the United States in lieu of an Act of Congress; and in our opinion one of the purposes of section 23 *** was to likewise take care of the case of a proposed structure in a non-navigable tributary of an interstate navigable stream.' United States v. Appalachian Electric Power Co., 4 Cir., 107 F. 2d 769, 795."

See also *Pennsylvania Water and Power Company v. Federal Power Commission,* 123 *Fed. 2d.* 155.

In *Grand River Dam Authority v. Going, 29 Fed. Sup.* 316, 325, the court said:

"(16) It seems clear that the United States is interested in any sort of project on a non-navigable tributary to a navigable river that tends to affect the volume of water naturally coming into the navigable stream from the tributary. This Court is of the opinion that the Federal Power Commision had jurisdiction to investigate the question with respect to the Grand River Dam and issue a license to the Grand River Dam Authority."

Although the Appalachian Power Company case was a far-reaching decision, there seems to be no question but what it made a final determination of the fact that the tributaries of every navigable stream and the right to use water in such tributaries for the development of power projects is within the purview of the Federal Power Act and that such projects are under the jurisdiction of the Federal Power Commission.

In the instant case the Deschutes River is an immediate tributary of the Columbia River and there appears to be no question as to the navigability of the Columbia River.

II.

JURISDICTION BY REASON OF OWNERSHIP OF LANDS.

POINTS AND AUTHORITIES

I.

Jurisdiction of the Federal Power Commission is premised upon the ownership of public lands and reser-

vations of the United States.

USCA Title 16, *Section* 797 (*e*).

II.

A state cannot by legislation destroy the right of the United States as the owner of lands bordering on a stream, to retain jurisdiction over the waters thereof.

U. S. v. Rio Grande Dam and Irrigation Co., 174 *US* 690, 19 *S. Ct.* 770, 43 *L. Ed.* 1136.

Utah Light and Power Company v. U. S., 243 *US* 389, 410, 61 *L. Ed.* 791.

California-Oregon Power Company v. Beaver Portland Cement Co., 295 *US* 142, 79 *L. Ed.* 1356, 1362.

III.

The United States under the terms of the Federal Power Act has paramount jurisdiction over lands owned by the United States and full control of the streams passing through the same.

U. S. v. San Francisco, 310 *US* 16, 29, 60 *S. Ct.* 749, 84 *L. Ed.* 1050. *Re-hearing denied* 310 *US* 657, 60 *S. Ct.* 1071, 84 *L. Ed.* 1420.

Federal Power Commission v. Idaho Power Company ——*US*——, 97 *L. Ed.* (*Advance Sheets, p.* 9).

ARGUMENT

The land upon which the Pelton Project is situated is owned by the United States government. The Deschutes River forms the easterly boundary of the Warm Springs Indian Reservation. The land on the east side of the Deschutes River is owned by the United States, having been withdrawn from entry and reserved for power purposes as hereinafter referred to.

The record before this court shows an original application in 1920 by the Columbia Valley Power Company, Inc. at substantially the same site as the Pelton Project. The Columbia Valley Power Company never fully carried through its construction of such project. The ownership of land, however, is therein shown to be in the United States government (R. 18, 19, 20). The description of the land is also shown in the record at page 157 and 158 as Exhibit F attached to the application of Northwest Power Supply Company. A similar showing is made on pages 224 and 225 of the record. See also the findings of the Examiner and the recommended decision (R331, 332) and order issuing license (R430).

Further evidence as to the ownership of lands was included in the record before the Federal Power Commission but was not made a part of the record in this court. The testimony of A. G. Sunda (Federal Power Commission record 809) and Waldemar Seton (Federal Power

Commission record 653) also referred to the ownership of these lands. Part of the testimony of F. R. Schanck is included in the record, but the court will note on page 579 of the printed record that a portion of the testimony of Mr. Schanck before the Federal Power Commission was omitted, being from pages 388 to 400, inclusive, of the record before the Federal Power Commission. Mr. Schanck in his testimony, which was not brought before this court, referred to water supply paper of the Geological Survey, No. 344, entitled "Deschutes River, Oregon and its Utilization" under which it is shown that the lands involved in this power project were withdrawn from entry by the United States government in 1910 and reserved for power purposes. The withdrawals for water power sites were made pursuant to the Act of June 25, 1910, *UCSA Title* 43, *Section* 141, and a similar act of the same date pertaining to Indian reservations, *USCA, Title* 43, *Section* 148. The United States asserts further jurisdiction over such public lands which may be used for power purposes under the provisions of the Federal Power Act, *USCA Title* 16, *Section* 818.

In *Camfield v. U. S.,* 167 *US* 518, 526, 42 *L. Ed.* 260, the United States Supreme Court pointed out that even though public lands are within a state this does not prevent the United States government from exercising jurisdiction over the property, and even the admission of a

territory as a state does not deprive the government of the power of legislating for the protection of the public lands therein, even though it may involve the exercise of the police power.

This was further emphasized by the United States Supreme Court in *United States v. Rio Grande Dam and Irrigation Company,* 174 *U. S.* 690, 19 *Sup. Ct.* 770, 43 *L. Ed.* 1136, where the court said:

> "Although this power of changing the common-law rule as to streams within its dominion undoubtedly belongs in each state, yet two limitations must be recognized; First, that in the absence of specific authority from Congress *a state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters;* so far at least as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the general government over interstate commerce and its natural highways vests in that government the right to take all needed measures to preserve the navigability of the navigable watercourses of the country even against any state action." (Emphasis ours).

The petitioners in the instant proceeding take the position that the sole jurisdiction for the granting of water rights or granting a permit for a power project rests in in the State of Oregon. The United States Supreme Court has decided this issue in many cases, including *Utah*

Power and Light Company v. United States, 243 *US* 389, 410, 61 *L. Ed.* 791, 816, where the court pointed out that in many instances a state has civil and criminal jurisdiction over property of the United States within its limits but such jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use, and to prescribe in what manner others may acquire rights in them.

In the case of *California-Oregon Power Company v. Beaver Portland Cement Company,* 295 *US* 142, 79 *L. Ed.* 1356, 1362, the United States Supreme Court pointed out the limitations upon this state power as follows:

> "Two limitations of state power were suggested: first, in the absence of any specific authority from Congress, that a state could not by its legislation destroy the right of the United States as the owner of lands bordering on a stream to the continued flow—so far, at least, as might be necessary for the beneficial use of the government property; and second, that its power was limited by that of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. With these exceptions, the court, however, thought (p. 706) that by the acts of 1866 and 1877 'Congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow,' and that 'the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common law rule, which permitted the appropriation of those waters for legitimate industries'."

See also *United States v. San Francisco,* 310 *U. S.* 16, 84 *L. Ed.* 1050.

III.

THE FEDERAL GOVERNMENT IS PARAMOUNT TO STATE STATUTES AS TO UNITED STATES PROPERTY.

POINTS AND AUTHORITIES

I.

Congress of the United States has full power to make any and all necessary regulations respecting property belonging to the United States.

U. S. Constitution Article IV, Sec. 3, *Clause* 2.

U. S. v. Rio Grande Dam and Irrigation Company, 174 *U. S.* 690, 19 *S. Ct.* 770, 43 *L. Ed.* 1136, 1141.

Forbes v. U. S., 125 *F. 2d.* 404, 408.

U. S. v. City and County of San Francisco, 310 *US* 16, 29, 60 *S. Ct.* 749, 84 *L. Ed.* 1051. *Rehearing denied,* 310 *US* 657, 60 *S. Ct.* 1071, 84 *L. Ed.* 1420.

II.

The right to regulate United States property also includes the right to use and regulate water running across such United States property.

Winters v. U. S. 207 *US* 564, 577, 52 *L. Ed.* 340, 346.

U. S. v. Walker River Irrigation District, 104 *F. 2d.* 334, 336.

U. S. v. McIntire, 101 *F. 2d.* 650, 653.

III.

The power of the federal government to reserve waters and to exempt them under the state laws cannot be denied.

U. S. v. Big Bend Transit Co., 42 *Fed. Sup.* 459, 467.

In re Water Rights of Hood River, 114 *Or.* 112, 172, 227 *P.* 1065.

ARGUMENT

Counsel for petitioners set forth as points upon which they would rely (Petitioners' brief, page 16, paragraphs 5 and 6), that there is no provision in the federal Constitution delegating to the federal government power to control the acquisition and use of non-navigable streams and claim that the Desert Land Act surrendered and re-

linquished to the states all rights with respect to the use of waters of non-navigable streams.

The founders of the federal Constitution in the original drafts thereof did not provide for a property clause. However, during the course of the Constitutional Convention, the property clause was tendered by Charles Pinckney of South Carolina. 5 *Elliott, Debates on the Federal Constitution,* 128-132. Toward the end of the Convention, the property clause was made a part of the Constitution. It is embodied as Article IV, Section 3, Clause 2, which gives the federal government full power and authority over property of the United States and which is not to be restricted by any state legislature.

This provision was discussed by the United States Supreme Court in *Rio Grande Dam and Irrigation Company,* 174 *US* 690, 19 *S. Ct.* 770, 43 *L. Ed.* 1136, 1141, where it emphatically stated that a state by its legislature cannot destroy the rights of the United States as the owner of lands bordering on a stream, to the continued flow of its waters. It is to be noted that the above case was decided subsequent to the Desert Land Act of 1877.

The same constitutional provision was alluded by the United States Supreme Court in *U. S. v. San Francisco,* 310 *U. S.* 16, 29-30, 60 *S. Ct.* 749, 84 *L. Ed.* 1051, 1059 as follows:

"Article 4, Sec. 3 cl. 2 of the Constitution provides that 'The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States.' The power over the public land thus intrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.' Thus, Congress may constitutionally limit the dispostion of the public domain to a manner consistent with its views of public policy. And the policy to govern disposal of rights to develop hydroelectric power in such public lands may, if Congress chooses, be one designed to avoid monopoly and to bring about a widespread distribution of benefits."

See also *United States v. California* 332 *U. S.* 19, 91 *L. Ed.* 1889, 1893.

In the recent case of *Federal Power Commission v. Idaho Power Company* —— *U. S.* ——, 97 *L. ed* (*Advance sheets p.* 9, 12), *decided November* 10, 1952, *the Su*preme Court said:

"Part I and Part II provide different regulatory schemes. Part II is an exercise of the commerce power over public utilities engaged in the interstate transmission and sale of electric energy. See S. Rep No. 621, 74th Cong, 1st Sess, p 17. Part II does not undertake to regulate public lands or the use of navigable streams. That function is covered by Part I, which dates back to the Federal Water Power Act of 1920, 41 Stat 1063. Section 4 (e) of Part I gives the Commission power to issue licenses to private or public bodies for the purpose of 'constructing operating and maintaining dams, water conduits,

> reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or *upon any part of the public lands and reservations of the United States* . . . (Italics added.)"

The same principle has been recognized by the State of Oregon through its supreme court *in re Water Rights of Hood River,* 114 *Or.* 112, 172, 227 *P.* 1065 where the Supreme Court of Oregon stated:

> "20. The case of *United States v. Rio Grande Irr. Co.,* 174 U. S. 690, 702 (43 L. Ed. 1136, 19 Sup. Ct. 770), is authority for the statement that it is undoubtedly true that a state may change its common-law rule as to every stream within its dominion and permit the appropriation of the flowing water for such purposes as it deems wise. This authority is limited, in the absence of the consent of Congress, so that the state cannot destroy the right of the United States to water necessary for beneficial use for government property and by the superior power of the government of the United States to prevent interference with the navigation of navigable streams."

In the case of *Winters v. U. S.,* 207 *US* 564, 577, 52 *L. Ed.* 340, 346, the question revolved about the right of the United States to the water of Milk River in the state of Montana. The United States asserted control over the water by reason of the fact that the river flowed

through the Fort Belknap Indian Reservation where it was again emphasized in the decision of the court that the power of the government to reserve the water and exempt it from appropriation under the state laws is not denied and could not be.

See also *U. S. v. McIntire, et al,* decided by the Circuit Court of Appeals for the Ninth Circuit, 101 *Fed. 2d.* 650, which involved the waters of Mud creek on the Flathead Indian Reservation in Montana.

In *U. S. v. Walker River Irrigation District,* 104 *Fed.* 2d. 334, 336, the court said:

> "(3, 4) It is of course well settled that private rights in the waters of non-navigable streams on the public domain are measured by local customs, laws and judicial decisions. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U. S. 142, 55 S. Ct. 725, 79 L. Ed. 1356. The act of July 26, 1866, 14 Stat. 251, 253, was no more than a formal confirmation of local law and usage which had therefore met with silent acquiescence on the part of the national government. Broder v. Natoma Water Co., 101 U. S. 274, 276, 25 L. Ed. 790; California Oregon Power Co. v. Beaver Portland Cement Co., supra, 295 U. S. pages 154, 155, 55 S. Ct. 725, 79 L. Ed. 1356. But it does not follow that the government may not, independently of the formalities of an actual appropriation, reserve the waters of non-navigable streams on the public domain if needed for governmental purposes."

The same reasoning is applied in *U. S. v. Big Bend Transit Co.,* 42 *Fed. Supp.* 459, 467.

Under the facts of the instant case there seems to be no question about the title to the land being owned by the United States as an Indian reservation on one side of the river and as part of the public domain on the other side of the river and all of the land having been reserved for water power purposes. Under these circumstances the rights of the federal government to use the land and the water in the stream for development of a hydro-electric project appears to be without question, and that the license granted by the Federal Power Commission premised upon a full investigation and hearing, findings of fact, pursuant to testimony and exhibits, should be upheld by this court.

IV.

THE PETITIONERS HAVE NEITHER A PRIOR RIGHT NOR ANY RIGHT TO THE WATERS OF THE DESCHUTES RIVER AT THE SITE OF THE PELTON PROJECT IN CONNECTION WITH THEIR SUPERVISION OF FISH

I.

The statutes of Oregon give a preference in the use of water for development of electric energy.

The furnishing of power has been declared a public use and necessity by the statutes of Oregon.

Section 116-415 *OCLA*

Grande Ronde Electric Co. v. Drake, 46 *Or.* 243, 245, 78 *P.* 1031.

Pringle Falls Power Company v. Patterson, 65 *Or.* 474, 483, 128 *P.* 820, 132 *P.* 527.

In re Rogue River, 102 *Or.* 60, 64, 201 *P.* 704

Re Waters of Hood River, 114 *Or.* 112, 186, 227 *P.* 1065

State v. Beaver Portland Cement Co. 169 *Or.* 1, 18, 124 *P. 2d.* 524, 126 *P. 2d.* 1094.

II.

The granting of water rights to a corporation under regulation has been recognized as devoting water to a public and beneficial use in the development of electric power.

State ex rel N. E. Electric Company v. Superior Court, 28 *Wash. 2d.* 476, 183 *P. 2d.* 802, 173 *ALR* 1351.

State ex rel Washington Water Power, et al v. Superior Court for Grant County, 8 *Wash. 2d.* 122, 111 *P. 2d.* 577.

Carstens et al, v. Public Utility Dist. No. 1 *of Lincoln County,* 8 *Wash. 2d.* 136, 111 *P. 2d.* 583.

Arcola Sugar Mills Co. v. Houston Lighting & Power Co., Tex. Civil Appeals, 153 *SW 2d.* 628, 632.

III.

Section 83-316 *OCLA* has been repealed by implication and cannot be reconciled with the Hydroelectric Act of Oregon, *Section* 119-107 *OCLA as amended by* Chapter 222, Oregon Laws 1945.

50 *A. J.* 548, *Section* 543.

50 *A. J.* 565, *Section* 564.

Stricklin v. Geide, 31 *Or.* 373, 376, 49 *P.* 982

Winslow v. Fleischner, 112 *Or.* 23, 26, 228 *P.* 101

Anthony, et al, v. Veatch, et al, 189 *Or.* 462, 481, 220 *P. 2d.* 493

U. S. v. Yuginovich, 256 *US* 450, 41 *S. Ct.* 451, 65 *L. Ed.* 1043.

IV.

An Indian treaty granting to an Indian tribe the exclusive right to all the fish in streams crossing or bordering the reservation is paramount to any rights of the state.

Warm Springs Indian Treaty of June 25, 1855, *Statutes at Large, Treaties and Proclamations of the U. S., Vol. XII, page* 964.

27 *A. J.* 548, *Sections* 10 *and* 11.

Tulee v. State of Washngton, 315 *U. S.* 681, 86 *L. Ed.* 1115.

U. S. v. Winans, 198 *US* 371, 49 *L. Ed.* 1089, 1092, 36 *C.J.S. page* 850, *Sec.* 18.

Frank Hynes, Regional Director, Fish and Wildlife Service v. Grimes Packing Co., et al, 337 *US* 86, 93 *L. Ed.* 1231, 1257.

V.

The petitioners are not aggrieved parties under the Federal Power Act.

USCA Title 16, *Section* 825 *e*

U. S. ex rel Chapman v. Federal Power Commission, 191 *Fed. 2d.* 796, 800.

Interstate Electric Inc. v. Federal Power Commission, 167 *Fed, 2d* 485

ARGUMENT

Counsel for petitioners has cited the act of Congress of August 18, 1848 creating the Territory of Oregon. We find nothing therein which would prevent the federal government from issuing the license which has been issued by the Federal Power Commission. It is true that

under Article XVIII, Section 7, of the Oregon Constitution, territorial laws in effect were continued in effect until they were altered or repealed. The laws of Oregon have been amended many times with respect to the use of water and also with respect to the regulation of fishing. The Supreme Court of Oregon in *Wright v. Wimberly,* 94 *Or. l,* 184, *P.* 740, definitely decided that the territorial code only continued to be the law of Oregon until the adoption of the Civil Code in 1862.

Porltand General Electric Company, as licensee and intervenor herein, takes the position that the petitioners, the Fish Commission of Oregon, and the Oregon State Game Commission, have no legal grounds to complain in this particular matter for the following reasons:

1. That the development of electric power has been declared a public use and necessity by the statutes and supreme court decisions of Oregon.

2. That the granting of such rights to a private corporation under regulation is a public and beneficial use of such water.

3. That the lands upon which the proposed power project would be situated are entirely federal lands and that the federal government has sole jurisdiction over both the land and the water.

4. That the Fish Commission of Oregon has shown

no rights to the use of water at the site of the Pelton Project.

5. That an effort was made to establish a fish refuge by submitting a bill to the legislature of Oregon in 1949, and the legislature refused to establish such fish refuge (R 433,560).

6. That the Federal Power Commission has given full consideration to facilities for preservation of fish, and if necessary, will make final determinations thereof under the terms of the license (R 445,446).

7. The *Section* 83-316 *OCLA* has been repealed by implication by the subsequent enactment of the Hydoelectric Act of Oregon and the provisions of *Section* 119-107 *OCLA as amended by Chapter* 222, *Laws of* 1945, which provides among other things that the Hydroelectric Commission shall take into consideration, in connection with any license, the use of the stream for beneficial purposes, including the propagation of fish.

8. That the treaty between the United States and the Warm Springs Indians dated June 25, 1855 accorded to the Indians the *exclusive* right of taking fish in the streams running through and *bordering* said reservation.

9. That the petitioners are not aggrieved parties under the provisions of the Federal Power Act.

WATER RIGHTS

In order to give the court an understanding of the water rights in the state of Oregon, we will dwell briefly upon some of the statutes and supreme court decisions. As early as 1899 the legislature of Oregon enacted the statute now known as *Section* 116-415 *OCLA reading* as follows:

> "Sec. 116-415. *Use of water to develop mineral resources and furnishing of power as public use and necessity: Right to divert waters: Multnomah falls.* The use of the water of the lakes and running streams of the state of Oregon for the purpose of developing the mineral resources of the state and to furnish electrical power for all purposes, is declared to be a public and beneficial use and a public necessity, and the right to divert unappropriated waters of any such lakes or streams for such public and beneficial use is hereby granted; provided, that the provisions of this act do not apply or extend to that certain stream situated in Multnomah county, Oregon, known as Multnomah creek, and sometimes called Coon creek, which stream forms Multnomah falls, but said stream and the flow of water therein shall not be diverted or interrupted for any purposes whatsoever."

The early statutes of Oregon provided for appropriation of water rights by the posting of notices at the point of diversion on a stream and the filing of notices or certificates in the office of the County Clerk of the county in which the proposed water right was situated. In 1909 Oregon enacted its water code under which applications were required to be filed with the State Engineer and

continuous use was required to be made of such water in order to protect it. The right to use the water was lost by non-use. Vested rights which were acquired prior to the act of 1909 were continued provided the use of the water continued thereunder.

As a further refinement of the provisions for the appropriation of water, the Hydroelectric Act of Oregon was adopted by the legislature in 1931 and is now embodied in the code of *Section* 119-101 *OCLA et seq.* Applicable provisions of the Hydroelectric Act are included in the appendix to this brief.

The court will note in the statute, *Section* 116-415 *OCLA,* above quoted, that the use of water to furnish electrical power for all purposes "is declared to be a public and beneficial use and a public necessity." The following decisions have appropriate definitions therein of public and beneficial use:

Smith v. Cameron, 106 *Or.* 1, 10, 210 *P.* 716, 27 *ALR* 510:

> "Section 5777, Or. L., does not pretend to assert that use by a particular individual is itself a public use. And so, too, Section 5789, Or. L., expressly declares that the use of water for mining and electrical power is a public use."

State Ex Rel. N. E. Electric Company v. Superior Court, 28 *Wash. 2d.* 476, 183*P. 2d.* 802, 173 *ALR* 1351:

"The generation and distribution of electric power has long been recognized as a public use by this court. State ex rel. Washington Water Power Co. vs. Superior Court (8 Wash. 2d. 122), 11 P. 2d. 577."

State ex. rel. Washington Water Power Co. et al, v. Superior Court for Grant County et al, 8 *Wash. 2d.* 122, 111 *P. 2d.* 577:

"The very nature of the business of furnishing electric energy determines that the use to which the condemned property is to be put is a public one. Under our present way of living, electricity is essentially necessary in order to enable our citizens to carry on their every day activities and pursue their accustomed manner of living. State ex rel. Chelan Electric Co. v. Superior Court, 142 Wash. 270, 253 P. 115, 58 A.L.R. 779; Brady v. Tacoma, 145 Wash. 351, 259, P. 1089, McCullough v. Interstate Power & Light Co., 163 Wash. 147, 300 P. 165; State ex rel. Willapa Electric Co. v. Superior Court, supra."

Carstens, et al, v. Public Utility Dist. No. 1 *of Lincoln County,* 8 *Wash. 2d.* 136, 111 *P. 2d.* 583:

"The generation and distribution of electric power has long been recognized as a public use by this court. State ex rel. Washington Water Power Co. v. Superior Court, Wash., 111 P. 2d. 577."

Arcola Sugar Mills Co. v. Houston Lighting & Power Co., Tex. Civil Appeals, 153 *SW 2d.* 628, 632:

"(2) The authorities followed in Texas—so cited and relied upon by the appellee, as respectively enumerated supra—uphold its several propositions.

> Our specified statutes, Article 1302, Sec. 14, Articles 1435, 1436 and 1438, construed together, as they should be, as applicable here, amount to a legislative declaration that appellee's business is to be regarded as being affected with a public use, in consequence of which it is delegated that small portion of the public authority denominated 'the power of eminent domain'; so that, the resulting question, if any, is whether the legislature might reasonably have considered that use a public one, not whether the use itself is actually a public one. 18 Am. Jur. 675, supra."

The Supreme Court of Oregon has also upon many occasions again declared that the use of water for furnishing of electrical power is a beneficial and public necessity. These excerpts from decisions of the Supreme Court of Oregon are as follows:

> *Grand Ronde Electric Co. v. Drake,* 46 *Or.* 243, 245, 78 *P.* 1031:
>
> "1. The use of water of streams in this State for the purpose of furnishing electrical power for all purposes is declared to be a beneficial and a public necessity, and the right to divert unappropriated water therefrom for such use is granted: B. & C. Comp. Sec. 5022. All corporations having title or possessory right to any land shall be entitled to the use and enjoyment of the water of any stream within the State, to furnish electrical power for any purposes, 'so that such use of the same does not materially affect or impair the rights of prior appropriations': B & C. Comp. Sec. 5023. All such corporations may appropriate and divert such waters, and may condemn rights of way for ditches for carrying the same, and may condemn the rights of riparian pro-

prietors upon the stream from which such appropriation is made, upon compliance with the terms of this act: B. & C. Comp. Sec. 5024."

Pringle Falls Power Co. v. Patterson, 65 *Or.* 474, 483, 128 *P.* 820, 132 *P.* 527:

"The different statutes providing for the appropriation of the water of the lakes and streams of the State of Oregon declare the use thereof, for irrigation and domestic consumption, for the development of the mineral resources of the state, and for furnishing electrical power (Sections 6525, 6551, L. O. L.), to be a public and beneficial use and public necessity, and the right to divert the surplus waters of such lakes and streams for such beneficial purposes is thereby granted.

"In the case of *Grande Ronde Elec. Co. v. Drake,* 46 Or. 243 (78 Pac. 1031), it was held that where plaintiff had complied with the provisions of the statute as to posting notices, etc., it had such a right as would enable it to exercise the right of eminent domain, and obtain a right of way for its ditch or canal."

In re Rogue River, 102 *Or.* 60, 64, 201 *P.* 704:

"The use of water of the lakes and the running streams of the State of Oregon for the purpose of developing the mineral resources of the state is declared to be a public and beneficial use and a public necessity, and the right to divert such unappropriated waters for such beneficial use."

In re Waters of Hood River, 114 *Or.* 112, 186, 227 *P.* 1065:

"By Section 5789, Or. L., the use of the waters of the state for the purpose of furnishing electrical power for all purposes is declared to be beneficial

use and a public necessity and confers the right to divert unappropriated waters for such beneficial use."

State v. Beaver Portland Cement Co., 169 *Or.* 1, 18, 124 *P. 2d.* 524, 126 *P. 2d.* 1094:

Section 116-415 O.C.L.A., reads in part as follows:

'The use of the water of the lakes and running streams of the state of Oregon for the purpose of developing the mineral resources of the state and to furnish electrical power for all purposes is declared to be a public and beneficial use and a public necessity, and the right to divert unappropriated waters of any such lakes or streams for such public and beneficial use is hereby granted.'

"This part of the section has been unchanged since its enactment in 1899 (Laws 1899, page 172)."

It is to be noted that with the improvement of the art of electric power, it quickly reached the place where it became a public necessity. Originally water power as such was used directly, but by changing it into electric energy, the place of use can be removed from the stream and the extensive use of electric power now has made it a necessity in every home, commercial establishment, and industrial plant. In fact, the whole economy of the country depends to a large extent upon the production of hydroelectric power.

As heretofore pointed out in this brief, the lands on both sides of the Deschutes River at the place of the proposed Pelton Project are owned by the United States

government and were withdrawn from entry and reserved specifically for the development of hydroelectric power although the portion of the record before the Federal Power Commission alluding to such withdrawal was not printed in the record before this court.

On the other hand, neither the Fish Commission of Oregon nor the Oregon State Game Commission make any claim to any water rights of any kind on the Deschutes River which would interfere in any way with the construction, operation and maintenance of the proposed hydroelectric project.

Shortly after this project was proposed in 1949, effort was made by petitioners and others in the 1949 legislative session in Oregon to have the Deschutes River set aside as a fish sanctuary, but the legislature refused to adopt such a statute (R 559, 560). Accordingly, the Federal Power Commission made its findings that the Deschutes River has not been established as a fish refuge by the State of Oregon (R 433).

Implied Repeal of Section 83-316 *OCLA*

It is contended by the intervenor that the provisions of *Section* 83-316 *OCLA* cited in petitioners' brief have been repealed by implication and by reason of the subsequent enactment of the Hydroelectric Act of Oregon. . .

Section 83-316 *OCLA* is reproduced in the appendix

to this brief. In was enacted in 1921. Also reproduced in the appendix as a part of the Hydroelectric Act of Oregon is *Section* 119-107 *OCLA as amended by Chapter* 222, *Oregon Laws* 1945. The Hydroelectric Act was adopted in 1931.

The 1921 act made provision for procuring a permit from the Fish Commission of Oregon in certain instances where a dam was about to be constructed of such a height that a fish ladder or fishway thereover was impracticable. The Hydroelectric Act of 1931 and the amendment of 1945 specifically provided that every application under the Hydroelectric Act was subject to protest and remonstrance on behalf of the public or any interested person or persons with respect to other beneficial uses of water, "including the propagation of fish". In other words the Hydroelectric Commission was given the responsibility of making any ultimate determination upon an application in such a manner that all of the uses of water would be taken into consideration, "including the propogation of fish." This subsequent statute is in direct conflict with the authority given under the 1921 act and inasmuch as the two statutes cannot be reconciled, the first statute is repealed by implication. See 50 *A. J.* 548, *Section* 543 and 50 *A. J.* 565, *Section* 564. In *Strickland v. Geide,* 31 *Or.* 373, 376, 49 *P.* 982, the court stated:

> "It is a rule of law sanctioned by this court that whenever two acts are repugnant, one inimical to the

other, so that both cannot stand, the later will operate as a repeal of the earlier by implication, without any express words of repeal; and such will be the effect, even when they are not repugnant in all their provisions, if the new statute revises the subject-matter of the old, and is plainly intended as a substitute for the old in toto: *Continental Insurance Company v. Riggen,* 31 *Or.* 336 (48 *Pac.* 476), and *Little v. Cogswell,* 20 *Or.* 345 (25 *Pac.* 727). Such a rule is not inimical to the doctrine that repeals by implication are never favored, nor to that which gives effect to several statutes upon the same subject whenever it is possible to do so; and it is firmly established elsewhere: *Dexter Road Company v. Allen,* 16 Barb. 15; *Roche v. Mayor, etc.* 40 N. J. Law, 257; *Daviess v. Fairbairn,* 3 *How.* 636; *Murdock v. City of Memphis,* 87 U. S. (20 Wall.), 590; *Swann v. Buck,* 40 Miss. 268; *City of Sacramento v. Bird,* 15 Cal. 294; and Endlich's Interpretation of Statutes, Secs. 200, 205."

See also *Winslow v. Fleischner,* 112 *Or.* 23, 26, 228 *P.* 101.

In *Anthony, et al v. Veatch, et al,* 189 *Or.* 462, 481, 220 *P. 2d* 493, the court said:

"13. 14. It is true that fish wheels and fish scows, the operation of which is prohibited by the act, were already banned long before this act was initiated (Gen. Laws, 1927, Ch. 1), but it is no objection to the validity of an act that it covers subject matter of earlier legislation. If earlier and later statutes are in irreconcilable conflict, then the earlier must yield to the later by implied repeal. *Winslow v. Fleischner,* 112 *Or.* 23, 228 *P.* 101, 34 A.L.R. 826, 50 Am. Jur., Statutes, Sec. 543."

See also *U. S. v. Yuginovich,* 256 *U. S.* 450, 41 *S. Ct.* 551, 65 *L. Ed.* 1043.

In the case of *Safe Harbor Water Corporation* v. *Federal Power Commission,* 124 *Fed. 2d.* 800, 804, with respect to repeal by implication of a portion of the Federal Power Act, the court stated:

> "(1-4) While it is the law that repeals by implication are not looked on with favor, United States v. Jackson, 302 U. S. 628, 631, 58 S. Ct. 390, 82 L. Ed. 488, none the less, conflicts and inconsistencies between provisions of acts may necessitate such repeals. The conflict or inconsistency, however, must be plain and irreconcilable. United States v. Tynen, 11 Wall. 88, 20 L. Ed. 153; United States v. State of California, 297, U. S. 175, 56 S. Ct. 421, 80 L. Ed. 567; H. Rouw Co. v. Crivella, 8 Cir., 105 F. 2d. 434; Posadas v. National City Bank, 296 U. S. 497, 56 S. Ct. 349, 80 L. Ed. 351. In the case at bar the District Court held that the review provisions of of Section 20 and Section 313 (b) presented no indissoluble conflict. But Section 313 (b) provides that the courts of appeals shall have '*** exclusive jurisdiction to affirm, modify, or set aside (the) *** order (of the Commission) in whole or in part.' In Jackson v. Cravens, 5 Cir. 238 F. 117, 120, it was said that ' *** where a statute provides a new, specific, and complete remedy, and fully covers the subject matter, the provisions of the (later) statute will be looked to alone, and resort will not be had to prior existing general remedies as cumulative.' In the case at bar since Section 313 (b) does provide a new and specific and complete remedy fully covering the subject matter, we conclude that the review given by the section just cited is 'exclusive' and that the review provisions of Section 20 must be deemed to have been repealed by implication."

RIGHTS TO FISH UNDER INDIAN TREATY

The Warm Springs Indian Reservation was formed pursuant to the Indian Treaty promulgated June 25, 1855, found in the Statutes at Large, Treaties and Proclamations of the United States, Volume XII, page 964. The boundaries of the Warm Springs Indian Reservation are such that for many miles a portion of the Deschutes and Metolius Rivers forms the boundary of the Warm Springs Indian Reservation, including all that portion of the Deschutes River bordering upon the site of the proposed Pelton Project, including the reservoir behind the dam.

The Treaty of June 25, 1855 among other things provides as follows: " * * * provided also that the *exclusive* right of taking fish in the streams running through and *bordering* said reservation is hereby secured to said Indians," (Emphasis ours.)

The Indian Treaty in question was entered into prior to the admission of Oregon as a state, but was not ratified by the Senate of the United States as a treaty until after the admission of Oregon into the Union. However, the Oregon Supreme Court has held that such a treaty relates back to the time it was signed even though it was subsequently ratified by the Senate. *Anthony V. Veatch,* 189 *Or.* 462, 485, 220 *P. 2d.* 493, 221 *P. 2d* 575.

There seems to be no question of the right of the

United States to make such a treaty. 42 *CJS, page* 681, *Section* 24. In the construction of treaties, it is found that they are liberally construed by the courts in favor of the Indians and not according to the technical meaning which lawyers might place upon words in such a treaty, but rather in the sense in which such words would be naturally understood by the Indians. 42 *CJS* 684, *Section* 25 (*b*); 27 *AJ* 548, *Sections* 10 *and* 11. Reference to the treaty was made in the record of this case. (R 543 to 546, incl.)

On several occasions the courts have construed treaties with the Indians relative to fishing rights. In *Tulee v. State of Washington,* 315 *US* 681, 86 *L. Ed.* 1115, the court was called upon to construe a treaty with the Yakima Tribe relative to fishing rights. The State of Washington attempted to regulate fishing by the Indians outside of the Indian reservation. The court held that the State was precluded under the provisions of the Indian treaty from attempting to collect any kind of fees from the Indians even though they were fishing outside the reservation. With respect to the general rule of construing a treaty, the court said:

> "In determining the scope of the reserved rights of hunting and fishing, we must not give the treaty the narrowest construction it will bear. In United States v. Winans, 198 US 371, 49 L. ed. 1089, 25 S Ct 662, this Court held that, despite the phrase 'in common with citizens of the territory,' Article 3 con-

ferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their 'usual and accustomed places' in the ceded area; and in Seufert Bros. Co. v. United States 249 US 194, 63 L ed 555, 39 S. Ct 203, a similar conclusion was reached even with respect to places outside the ceded area. From the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people. United States v. Kagama, 118 US 375, 384, 30 L ed 228, 231, 6 S Ct. 1109; Seufert Bros. Co. v. United States, supra (249 US 198, 199, 63 L ed 558, 559, 39 S Ct 203)."

In *United States v. Winans,* 198 *US* 371, 49 *L. Ed.* 1089, 1092, the United States Supreme Court gave a well-considered opinion with respect to the interpretation of an Indian treaty determining that the fishing rights referred to in the treaty with the Yakima nation in the State of Washington entered into at approximately the same time as the treaty with the tribes of middle Oregon holding the treaty was not a grant of rights to the Indians, but was a grant of rights from the Indians to the United States, and the fishing rights were in the nature of a reservation of rights by the Indians. In its opinion the Court said:

"The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds, as dealings between private individuals. The reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved 'in common with citizens of the territory.' As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given 'the right of taking fish at all usual and accustomed places', and the right 'of erecting temporary buildings for curing them.' The contingency of the future ownership of the lands, therefore, was foreseen and provided for; in other words, the Indians were given a right in the land,—the right of crossing it to the river,—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. And the right was intended to be continuing against the United States and its grantees as well as against the state and its grantees."

36 C.J.S., *page* 850, *Sec.* 18, with respect to Indians' rights of fishery gives the general law with the same thought and also observed that such treaties are not subordinate to the powers acquired by a state in and over the water in question. The text reads as follows:

> "Where a treaty with the Indians gives them the right to fish on their reservation, *the state laws relating to fishing do not apply to them;* and, under some statutes, Indians are expressly exempted from the operation of the statute. Where, however, the Indian reservation has been included within the limits of a state formed since the treaty, without reserving the rights of the Indians, such laws may be enforced against them. *Treaties with Indians reserving in them the right of fishery will be construed according to their natural meaning and the Indians' understanding thereof.* A treaty with a tribe of Indians which secures to them the right of taking fish 'at usual and accustomed places in common with the citizens' of the territory reserves to them the right to fish outside of the boundaries of the lands ceded by them by the treaty; but such treaties, or treaties with somewhat similar terms, do not give to the Indians any exclusive or special privilege outside of their reservation, but only such rights as may be enjoyed by all citizens in common, and state laws abridging the fishing rights of citizens are equally effective as against the Indians. The Indians' rights under such treaties *are not subordinate to the power acquired by a state in and over the waters in question on its being admitted to the Union as a state;* nor can such rights be taken from the Indians by grants to private persons, by the United States or a state." (Emphasis ours.)

In applying this law of interpretation to the provisions

of the treaty with the Central Oregon tribes, it is only necessary to give a simple interpretation of that portion of the treaty above quoted which gave the Indians the "exclusive right of taking fish in the streams running through and bordering said reservation." The word "exclusive" can only have one ordinary meaning in the minds of the Indians, and that would be to the effect that the Indians and no others have the right of taking fish in such streams. The treaty was not limited to any kind of fish nor was it limited to streams merely running through the reservation, but included streams "bordering said reservation". The term "exclusive" has been interpreted by the United States Supreme Court in its ordinary sense. In *Frank Hynes, Regional Director, Fish and Wildlife Service, Department of the Interior, v. Grimes Packing Co., et al,* 337 *US* 86, 93 *L, Ed.* 1231, 1257, the Supreme Court of the United States considered an act of Congress which prohibited the granting of an "exclusive" right of fishery and determined that this would forbid not only a grant to a single person or corporation, but to any special group or number of people. The word "exclusive" in the Indian treaty would therefore mean that not only individuals were prohibited from the right of fishery in the Deschutes River, but also all other groups, including the State of Oregon, the Oregon State Game Commission, and the Fish Commission of Oregon. In view of the liberal interpretation given to

Indian treaties and the construction thereof in favor of the Indian tribes, it could well be argued that the exclusive right to take the fish on all streams bordering said reservation would include all fish from the source of the Deschutes and its tributaries to the mouth thereof. Giving consideration to the habits, customs and necessities of the Indians at the time of entering into the treaty in which the right of fishery was a matter of subsistence, and the usual habits of the Indians to fish the entire stream, such an interpretation would not be illogical. However, there would seem to be no question whatsoever as to that portion of the Metolius and Deschutes Rivers constituting boundaries of the reservation which would form a fish sanctuary for the benefits of the Indians and their exclusive use, and would exclude any rights whatsoever of the Fish Commission of Oregon under any statutes which the Legislature might enact. For these reasons the provisions of Section 83-316, *Oregon Compiled Laws Annotated* should have no deterring effect whatsoever upon the construction of a dam and powerhouse on the Deschutes River adjacent to the Warm Springs Indian Reservation.

Petitioners Not Aggrieved Parties

Petitioners are not aggrieved parties under the Federal Power Act. Under the provisions of *Title* 16, *Section* 825 *l USCA,* only a party aggrieved by an order of

the Commission may obtain a review of such order in the Circuit Court of Appeals. In this case the record is entirely devoid of any evidence whatsoever that the Fish Commission of Oregon or the Oregon State Game Commission claim any rights to water, land, or fish at the location of the proposed project. The record does show that they do not even have any right to the fish in view of the Indian treaty above referred to.

In the case of *U. S. ex rel Chapman v. Federal Power Commission,* 191 *Fed. 2d.* 796, 800, the Secretary of the Interior and a co-operative association petitioned for the review of an order of the Federal Power Commission granting a license to the Virginia Electric and Power Company to construct a dam at Roanoke Rapids, North Carolina. The court held that the petitioners were not parties aggrieved under the above statute. In its opinion, the court said:

> "(5) For the reasons stated, we are of the opinion that petitioners are not parties aggrieved within the meaning of the statute and consequently have no standing in court to ask that the order of the Commission be reviewed or set aside. Assuming, however, that they have made a case entitling them to relief, since we are of the opinion, for reasons which we shall not examine, that the granting of the license here in question was within the Commission's power and that there is no basis for holding that the discretion vested in it by law was not properly exercised."

Also in the case of *Interstate Electric, Inc. v. Federal*

Power Commission, 164 *Fed. 2d.* 485, the court held that the Interstate Electric, Inc., the State Public Utility Commissioners Association, and the State Grange were not parties aggrieved by an order of the Federal Power Commission.

We respectfully submit that the petitioners have established no rights under which they can take an appeal from an order of the Federal Power Commission.

V.

FEDERAL AUTHORITY IS PARAMOUNT TO THAT OF A STATE IN ALL MATTERS WHERE THE UNITED STATES HAS JURISDICTION

Many authorities heretofore given in this brief point out the authority of the federal government in the present instance. However, it has been decided by the United States Supreme Court that when there is a conflict between the rights of the federal government and state commissions or state statutes with respect to a federal power license over which the Federal Power Commission has jurisdiction, then such conflict is resolved in favor of the federal government. In *First Iowa Hydroelectric Cooperative v. Federal Power Commission, State of Iowa Intervenor,* 328 *US* 152, 90 *L. Ed.* 1143, the state of Iowa invoked a state statute which required that "the method

of construction, operation, maintenance and equipment of any and all dams in such waters shall be subject to the approval of the executive council". In its opinion the court stated:

> "To require the petitioner to secure the actual grant to it of a State permit under section 7767 as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Council of Iowa a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the federal act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government."

and also in 90 L. Ed., page 1151, as follows:

> "In those sections the Act places the responsibility squarely upon federal officials and usually upon the Federal Power Commission. A dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable. 'Compliance with the requirements' of such a duplicated system of licensing would be nearly as bad. Conformity to both standards would be impossible in some cases and probably difficult in most of of them. The solution adopted by Congress, as to what evidence an applicant for a federal license should submit to the Federal Power Commission, appears in section 9 of its Act. It contains not only subsection (b) but also subsections (a) and (c). Section 9(c) permits the Commission to secure from the applicant 'Such additional information as the commission may require.' This enables it to secure, *in so far as it deems it material,* such parts or all of the information that the respective states may have pre-

scribed in state statutes as a basis for state action. The entire administrative procedure required as to the present application for a license is described in section 9 and in the Rules of Practice and Regulations of the Commission.

"The securing of an Iowa state permit is not in any sense a condition precedent or an administrative procedure that must be exhausted before securing a federal license. It is a procedure required by the State of Iowa in dealing with its local streams and also with the waters of the United States within that State in the absence of an assumption of jurisdiction by the United States over the navigability of its waters. Now that the Federal Government has taken jurisdiction of such waters under the Federal Power Act, it has not by statute or regulation added to the state requirements to its federal requirements."

Subsequent proceedings in the federal court, *State of Iowa v. Federal Power Commission,* 178, *Fed. 2d.* 421, gives the history of the United States Supreme Court case above referred to. On page 426 the court stated:

"We think that the decision of the Supreme Court in the First Iowa Hydro-Electric Cooperative case, 328, U. S. 152, 66 S. Ct. 906, 90 L. Ed. 1143, disposes of this contention. As we read that opinion, it holds that section 9(b) of the Act does not require the Commission to compel the applicant to produce evidence that it has complied with all of the applicable laws of Iowa before a license may be granted. Speaking of section 9(b) of the Act, The Supreme Court said at page 177 of 328 U. S., at page 918 of 66 S. Ct.: 'It (section 9(b)) does not itself require compliance with any state laws. Its reference to state laws is by way of suggestion to the Federal Power Commission of subjects as to which the Commission may wish

some proof submitted to it of the applicant's progress. The evidence required is described merely as that which shall be "satisfactory" to the Commission. The need for compliance with applicable state laws, if any, arises not from this federal statute but from the effectiveness of the state statutes themselves.'

"The Court also said at page 181 of 328 U. S., at page 920 of 66 S. Ct.: 'The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls.

"We gather from the opinion of the Supreme Court that, while the Federal Power Commission may properly concern itself with the question whether an applicant for a license can comply with applicable state laws, if any, relating to the proposed project and the business in which the applicant proposes to engage, the Commission is not compelled to do so, but may license the project and let the licensee take his chances of being able to comply with the applicable state laws, or such of them as have not been superseded by the Federal Power Act. We think that the challenged orders of the Commission may not be invalidated by this Court because of the asserted noncompliance by the Commission with section 9(b) of the Act."

This court will also note on page 428 of the opinion last above referred to that the court pointed out "the defects, if any, in the commission's proceedings relative to the protection of wildlife resources could not, in our opinion, be regarded as sufficiently vital or prejudicial to justify a vacation of the orders under review."

Petition for writ of certiorari was filed with the United States Supreme Court from the above decision

and was denied, 339 US 979, 94 L. Ed. 1383.

In petitioners' brief attempt is made to distinguish the First Iowa Hydroelectric case by reason of the finding of the Federal Power Commission that the Cedar River in Iowa was navigable. Whether or not the Deschutes River might be considered navigable if the Federal Power Commission takes jurisdiction over the site of the Pelton Project by reason of ownership of land, the reasoning of the First Iowa Hydroelectric case would have to be applied thereto by reason of the sovereignty of the United States. In fact on page 42 of petitioner's brief, the theory of navigation as set forth in the Appalachian Power case was practically admitted by the petitioners. In referring to the First Iowa Hydroelectric case, they asserted that the Supreme Court took jurisdiction because the flow of the Cedar River would substantially affect the flow and navigable capacity of Iowa River, and that the operation of such a project would cause fluctuation in the flow and navigable capacity in the Mississippi River.

The paramount jurisdiction of the United States over such water was also emphasized in *United States v. California,* 332 *US* 19, 91 *L. Ed.* 1889.

We respectfully submit that in this instance the United States government has paramount jurisdiction over the water of the Deschutes River, not only by reason of the fact that it is a direct tributary of the navigable Columbia

River, but also by reason of the ownership of lands on both sides of the river that would be affected by the construction of the Pelton Project.

CONCLUSION

The simple facts of this case show that the intervenor, Portland General Electric Company, was required to make application to the Federal Power Commission for a license under the provisions of the Federal Power Act. The Deschutes River is an immediate tributary of the Columbia River and within the definition of navigable waters as contemplated by the Federal Power Act and as announced by the United States Supreme Court. The lands on both sides of the river at the site of the proposed Pelton Project are owned by the United States government. On any questions of fact for determination, the entire record of the Federal Power Commission has not been brought before the court, and its findings on such questions of fact would necessarily be final.

Under these facts and the statutes and decisions herein cited, the jurisdiction of the United States over both the land and the waters cannot be denied.

The only remaining question that could be interposed by the petitioners would be that which pertains to the protection of any state rights in the granting of a license. The provisions of the Federal Power Act are sufficiently

broad to give protection to any and all uses of water, including adequate protection for preservation and propagation of fish. The terms of the license indicate that not only a full and fair hearing was had on the facts, but that the Federal Power Commission was making every effort to protect all uses of water in the area in an effort to coordinate the use of the water for hydroelectric purposes with that of other uses, such as domestic water supply, municipal use, irrigation and facilities for fish, as well as looking to the best interests of the Indian tribe as to the use of their property.

The petitioners, Fish Commission of Oregon and the Oregon State Game Commission, have shown no rights whatsoever with respect to the use of such waters, and the Federal Power Commission made its determination that fish life in the stream could be preserved and possibly enhanced. In any event, under the provisions of the Indian treaty, the State of Oregon had no jurisdiction whatsoever over fish in the stream, and the petitioners are not aggrevied parties entitled to a review within the provisions of the Federal Power Act.

Finally, it is recognized that only confusion would result from having different governmental agencies attempting to make final determinations in cases of this character. Either the federal government is sovereign in its power or that sovereignty rests in the state. Under the numerous

decisions given herein, we do not believe that this court can come to any other conclusion than that the United States has the sovereign right with respect to the issuance of a license on the Pelton Project for the use of government lands and water over which they do and should maintain sovereign control.

We respectfully submit that the order of the Federal Power Commission granting a license to Portland General Electric Company should be affirmed and the petition for writ of review dismissed.

Respectfully submitted,

CLARENCE D. PHILLIPS
Attorney for Intervenor,
Portland General Electric Company
807 Electric Building
Portland, Oregon

Of Counsel
PHILLIPS, COUGHLIN, BUELL & PHILLIPS
807 Electric Building
Portland, Oregon

APPENDIX

Section 83-316. *OCLA*

"Sec. 83-316 OCLA. Dams to be provided with hatchery when: (Permit: Conveyance of necessary land: Operation of hatchery: Bond: Dams heretofore constructed). In the event that any person desires to construct a dam in any of the streams of this state to a height that will make a fish ladder or fishway thereover impracticable, in the opinion of the commission, then such person may make an application to the commission for a permit to construct such dam, and the commission is hereby authorized to grant such permit in its discretion, upon the condition that the person so applying for such permit shall convey to the state of Oregon a site of the size and dimensions satisfactory to the commission, at such place as may be selected by the commission, and erect thereon a hatchery and hatchery residence, according to plans and specifications to be furnished by the commission, and enter into an agreement with the commission, secured by a good and sufficient bond, to furnish all water and light, without expense, to operate said proposed hatchery; and no permit for the construction of any such dam shall be given by the commission until the person applying for such permit shall have actually conveyed said land to the state and erected said hatchery and hatchery residence in accordance with the said plans and specifications. The provisions of this section shall not apply to cases where dams have been heretofore constructed in streams to a height where the construction of a fish ladder is impracticable, provided an agreement has been entered into and executed with reference to the construction and maintenance of such dam between the commission and the owners thereof. (L. 1921, ch. 105, Sec. 49, p. 156; O. C. 1930, Sec. 40-217)."

Section 119-107 *OCLA as amended by Chapter* 222, *Oregon Laws,* 1945.

"Section 1. That section 119-107, O.C.L.A., be and the same hereby is amended so as to read as follows:

Sec. 119-107. A preliminary permit may be issued by the commission to any person, persons, associations or private corporations, possessing the qualifications of a licensee as hereinbefore specified. The application for a preliminary permit shall set forth the name and postoffice address of the applicant, the approximate site of any proposed dam or diversion, the amount of water in cubic feet per second, the theoretical horsepower and such other data as the commission may be (by) regulation or order prescribe. Upon receipt of an application for a preliminary permit it shall be the duty of the state engineer, as ex officio secretary of the commission, to make an endorsement thereon of the date of receipt and to keep a record thereof, which date so endorsed shall determine the priority of the use of water initiated under the provisions of this act. At the time of filing the application for a preliminary permit the applicant shall pay to the state of Oregon the minimum sum of $50, and such further sum, not exceeding $200, as shall be determined by the commission, to cover costs of recording publishing notice and making such investigation as may be necessary to determine whether or not a preliminary permit should be granted. If the commission shall conclude to grant a preliminary permit the applicant shall pay to the state of Oregon, at the time such preliminary permit is issued, and in addition to the sums hereinbefore specified, the sum of 5 cents for each theoretical horsepower as computed by the commission and covered by the permit. Whenever an application is made for a preliminary permit the commission shall give written notice of the filing of such application to any municipality or other person or corporation which, in the judgment of the commission, is likely to be interested in or affected thereby, and shall also publish notice of such application once each week for at least four consecutive weeks and for such further time, if any, as the

commission shall determine, in a newspaper published in the county in which the project covered by the application is located, and if in more than one county, then in a newspaper published in each county; provided, however, that no application for the appropriation or use of water for the development of 1,000 theoretical horsepower or more shall be granted until the expiration of at least six months after the application for a preliminary permit therefor has been filed with the commission. The commission shall, by order or regulation, provide for the time and manner of hearings upon such application. Every application for the appropriation of water for the generation of electricity subject to the terms of this act shall be subject to protest or remonstrance on behalf of the public or any district organized for public purposes, or any interested private person or persons, on the ground that the proposed construction, development or improvement would damage or destroy the use or utility of the stream or other body of water involved for other beneficial purposes, including the propagation of fish, scenic, esthetic, recreational, park, highway or other beneficial use. All such protests and remonstrances must be filed with the commission within the time specified in the notice and must be in writing and verified by the parties so protesting. A certified copy thereof shall be served upon the applicant for the permit; provided, that in the discretion of the commission at the time of the hearing any interested party may make an oral protest if there exists any good reason therefor and the commission shall allow the applicant to be heard in opposition thereto. Every protest or remonstrance which is not filed and served as herein required shall be deemed waived. The purpose for which a preliminary permit may be issued is to enable the applicant to make necessary examinations, surveys, and prepare maps, plans, specifications and cost estimates of any proposed project and to make such other preparation as may be necessary to carry forward the work if a license is issued therefor."